Supreme Court, U.S.
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No. 95-857

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CAESAR HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As the petition demonstrated, this case raises an important and recurring question that has divided the federal courts of appeals: whether a criminal defendant may be convicted simply because he has taken the stand and plausibly denied guilt. Unable to dispute the importance of this question, the Government argues that this case is not a proper vehicle for considering it and that the question will not recur in the future. These arguments are without merit.

1. The Government does not — and cannot — dispute that the issue presented in this case warrants this Court's attention. The petitioner showed (Pet. 6-10) that the lower courts are divided over the proper treatment on appeal of apparent disbelief of a defendant's exculpatory testimony. Far from denying this conflict, the Government concedes its existence. Opp. 8. Indeed, the Government acknowledges that the First Circuit has "recently noted the disagreement" among the circuits over this issue. Opp. 9, 12 n.5 (citing *Walker v. Waltham Housing Authority*, 44 F.3d 1042, 1049-50 (1st Cir. 1995)). Nor does the Government suggest that this conflict will resolve itself absent this Court's attention. Thus, it is undisputed that this Court's intervention is warranted.

2. The Government does not attempt to defend the reasoning of the decision below. As the petition established (Pet. 12-13), the decision below sharply departed from traditional practice and applied a rule of sweeping generality: that whenever there is "some corroborative evidence of guilt," a defendant's testimony denying guilt is sufficient to sustain a conviction. Far from defending this rule, the Government appears to concede that it conflicts with this Court's decision in *Nishikawa v. Dulles*, 356 U.S. 129, 137 (1958). Specifically, the Government acknowledges that in *Nishikawa* this Court held that "a factfinder's disbelief of a party's testimony does not by itself suffice to meet the opposing party's burden of proof." Opp. 13 n.5 (citations omitted). Moreover, the Government does not attempt to reconcile the decision below with *Nishikawa*: it simply

notes that the Eleventh Circuit did not "[take] issue" with *Nishikawa*. Opp. 13 n.5.[1]

3. The Government's primary contention (Opp. 8-14) is that, even without the conclusive presumption applied by the Eleventh Circuit, the evidence in the record is sufficient to prove that petitioner knew of the cocaine concealed in the Blazer he was driving when arrested. The decision below did not, however, rely on such alternative grounds, and it is inappropriate for this Court at the certiorari stage to conduct an independent review of the sufficiency of the evidence in the record, especially in light of the omissions in the Government's analysis of that record.

a. The Government's analysis ignores direct and probative evidence that petitioner did not know of the cocaine concealed in the Blazer. The Government itself presented evidence establishing that law enforcement agents concealed cocaine inside a box and placed that box in the rear compartment of the Blazer (1 Trans. 55); that petitioner did not look into the rear compartment or otherwise inspect the box (1 Trans. 73-74, 108); and that the box was recovered in the position where it had been earlier placed (1 Trans. 104). This demonstrates that petitioner could only have learned of the cocaine if he had been told of it. The Government, however, also presented unrefuted evidence that no one informed petitioner about the cocaine: Jose Pereira, the Government's cooperating witness, testified that neither he nor anyone else told petitioner of the contents of the box. 2 Trans. 215-16, 220-21. Moreover, Petitioner's testimony not only corroborated the evidence offered by the Government; it also provided a plausible and innocuous explanation for his use of the

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[1] To the extent that the Government acknowledges the conflict between *Nishikawa* and the decision below, this Court should grant the petition, vacate the decision below, and remand for further consideration in light of *Nishikawa*. *See Stutson v. United States*, 64 U.S.L.W. 3459 (U.S. Jan. 8, 1996) (per curiam).

Blazer: he was performing what he thought to be a minor favor for his brother-in-law. 2 Trans. 67-72, 98.[2]

b. The Government also neglects to describe fully the circumstantial evidence upon which it relies. For example, the Government suggests (Opp. 3, 14) that an odor emanating from the cocaine concealed in the Blazer might have made petitioner aware of the cocaine. It fails, however, to acknowledge that there was no testimony that petitioner had smelled cocaine before, no testimony that he could recognize its solvent-like odor, and no testimony that such an odor was discernible in the Blazer. 1 Trans. 27-28, 56-58. Likewise, while the Government contends that the box in which the cocaine was concealed was "bulging" and its top flaps were "raised one or two inches," Opp. 2-3, 14, it fails to inform the Court that there was no evidence that petitioner ever saw the box or that, if he had, he could have discerned its contents.[3] And when the Government asserts that Pereira loaned petitioner $30,000 and "spent large amounts of money on members of his family," Opp. 5, 14, it fails to acknowledge that the loans were made when petitioner's daughter (and Pereira's niece) fell seriously ill and when petitioner purchased a home (1 Trans. 45-47, 50) and that Pereira's largest

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[2] Contrary to the Government's suggestion (Opp. 13), this testimony would not warrant a negative inference under the approach taken by the District of Columbia Circuit. That approach permits appellate courts to draw negative inferences only when a defendant's testimony is "utterly inconsistent, incoherent, contradictory or implausible." *United States v. Zeigler*, 994 F.2d 845, 849 (D.C. Cir. 1993). Plainly, given the evidence corroborating petitioner's testimony, that is not the case here.

[3] The Government also fails to explain how it would be relevant if petitioner had smelled or otherwise become aware of the cocaine *after* entering the Blazer. As the Government acknowledges (Opp. 8-9), one of the elements of the offense for which petitioner was convicted is intent to distribute cocaine. That petitioner may have become aware of cocaine concealed in the vehicle after he entered it does not establish such an intent.

expenditure was for a house for his own mother (2 Trans. 39-42) — hardly suspicious circumstances.

c. Finally, the Government fails to acknowledge the limited probative value of the circumstantial evidence upon which it relies. For example, the Government relies (Opp. 9) on evidence of supposed flight, even though such evidence has been "widely acknowledged" as "only marginally probative." *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977) (quotation omitted); *see also Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963) (noting that this Court has "consistently doubted" the probative value of flight). Similarly, the Government points (Opp. 14) to supposedly false testimony without disputing that such evidence is of only "modest probative value." Pet. 14 (quotation omitted). Likewise, it relies (Opp. 10) on prior acts evidence without acknowledging that the probative value of such evidence is dependent on the existence of something not present here: "a close parallel between the crime charged and the acts shown." *United States v. Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975) (Friendly, J.) (citation omitted), *cert. denied*, 425 U.S. 958 (1976).

In the face of the direct and unrefuted evidence presented by the Government itself that petitioner did not know of the cocaine concealed in the Blazer, this circumstantial evidence cannot establish petitioner's knowledge — absent the sort of blanket presumption employed in the decision below.

4. The Government's final argument (Opp. 14-15) is that the issue presented in this case is unlikely to recur in the future. While the Government does not deny that this issue has recurred frequently in the past, *see* Pet. 16, the Government contends that it will not do so in the future due to a 1994 amendment to Rule 29 of the Federal Rules of Criminal Procedure. This argument is without merit.

First, Rule 29 applies only in federal criminal cases. Questions concerning the probative value of a defendant's denial of guilt, however, frequently recur in state court, where the vast majority of criminal cases are brought. *See, e.g., Connecticut v. Alfonso*,

490 A.2d 75, 81 (Conn. 1985); *People v. Morrin*, 187 N.W.2d 434, 451 & n.54 (Mich. Ct. App. 1971); *Pennsylvania v. Shocker*, 292 A.2d 492, 494 (Pa. Super. Ct. 1972) (per curiam); *Rhode Island v. Mattatall*, 603 A.2d 1098, 1109 (R.I. 1992). Moreover, as the Government recognizes (Opp. 12 n.5), similar issues frequently arise in federal civil and administrative proceedings. *See, e.g., Nishikawa*, 356 U.S. 129; *Walker v. Waltham Housing Auth.*, 44 F.3d at 1050; *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662, 680 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991). As a consequence, whatever effect the amendment to Rule 29(b) may have in federal criminal cases, the issue presented in this case will still frequently recur in other contexts.

Second, the Government offers little reason to think that the 1994 amendment to Rule 29(b) will prevent this issue from recurring in future federal criminal cases. The Government correctly states (Opp. 15) that under the amended rule defendants are able to request that judgment on motions to acquit brought at the close of the Government's case in chief be reserved until the end of trial. The Government does not, however, argue that competent defense counsel will in fact make such requests. Nor is this surprising. When a judge grants a motion to acquit at the close of the Government's case in chief, the Government cannot appeal the acquittal because of the Double Jeopardy Clause's prohibition on impaneling a second jury. *See Smallis v. Pennsylvania*, 476 U.S. 140 (1986). When, however, a defendant is acquitted after the verdict has been entered, there is no double jeopardy problem and the Government may appeal the acquittal. *See* W. LaFave & J. Israel, *Criminal Procedure* § 24.1(d), at 66 (1984). Thus, competent defense counsel will be loath to request deferral of motions to acquit and thereby risk reversal of an acquittal on appeal. Furthermore, while Rule 29(b) permits judges to reserve ruling on motions to acquit, it does not compel them to do so, and the Government offers little reason to suppose that trial judges will uniformly depart from the pre-amendment practice of deciding such motions when they are made.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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